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UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

WESTERN RESOURCES, INC., Docket No. 00-CV-2043-CM

 Plaintiff, Kansas City, Kansas
 Date: 7/23/02
 v. Time: 9:00 a.m.

UNION PACIFIC RAILROAD CO.
and
THE BURLINGTON NORTHERN and
SANTA FE RAILWAY CO.,

 Defendants.

DISPOSITIVE MOTIONS HEARING
BEFORE THE HONORABLE CARLOS MURGUIA,
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

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9 913-551-5646
10 Proceedings recorded by machine shorthand, transcript
produced by computer-aided transcription.

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1 THE COURT: Let the record show we're in United
2 States District Court for the district of Kansas. We're
3 here regarding Case Number 00-2043. It's a case entitled
4 Western Resources, Incorporated versus Union Pacific
5 Railroad Company and the Burlington Northern and Santa Fe
6 Railway Company. Would the parties please enter their
7 appearance?

8 MR. BODAMER: Your Honor, Brad Bodamer, Alexis
9 Noack, and William Hanna of Stinson Morrison and Hecker
10 on behalf of the plaintiff Western Resources. Also
11 present is Frank Pergolizzi of the Washington, DC firm of
12 Slover & Loftus.

13 MR. YERETSKY: Your Honor, on behalf of the Union
14 Pacific, James Yeretsky of Yeretsky and Maher. Craig
15 Leff is seated at the row behind counsel table. I'd also
16 like to introduce, immediately to my left, Jay Smith of
17 the firm of Covington & Burling, and seated next to
18 Mr. Smith is Harris Weinstein, also of the firm of
19 Covington & Burling. Mr. Weinstein, sir, will be making
20 the presentation on behalf of the Union Pacific today.

21 MR. DALGLEISH: Good morning, Your Honor.

22 THE COURT: Morning. Before you begin--

23 MR. DALGLEISH: I was going to do the rest of the
24 introductions.

25 THE COURT: I'm sorry. Go ahead.

1 MR. DALGLEISH: My name is Doug Dalglish. I'm
2 with the firm of Lathrop and Gage, for Burlington
3 Northern Santa Fe. Present is Mr. Sam Sipe with the law
4 firm of Steptoe and Johnson. He'll be arguing today.
5 Thank you, Your Honor.

6 THE COURT: Sorry, Mr. Dalglish. All right.
7 Counsel, first of all, I want to thank you for being here
8 this morning on very short notice. Apologize, we got a
9 little bit delayed this morning. Appreciate you being
10 here on time. Have a full schedule for this morning, and
11 I'm gonna ask for your cooperation in going over each one
12 of these items that I am gonna bring up with you. To
13 start with, I'm gonna go over the schedule that we have,
14 at least at this point. Today, we're gonna do a hearing
15 on dispositive motions that have been filed, some other
16 motions that the court's gonna identify to you. Right
17 now, tentatively, we have scheduled August 7th, 8th, and
18 9th for Daubert hearings, and those hearings are to--
19 scheduled to begin at 9:30 in the morning. In regards to
20 the August 9th date, I would let you know, there's a
21 possibility the court is not gonna be available on that
22 date. That is still not certain, but I will let you know
23 that's a possibility. August 15th and 16th are scheduled
24 for motion in limine hearings. And those are at 9:30 in
25 the morning. August 19th is when our trial is scheduled

1 to begin at 1:30 in the morning (sic.). In regards to
2 that trial setting, I know there's defendant's motion for
3 a continuance. In regards to that motion and all the
4 pleadings that have been filed in this case, and the
5 court's gonna rule on, the court intends to issue several
6 rulings this morning, and I would tell you that most of
7 those rulings or some of those rulings the court believes
8 it can make a ruling without the benefit of any
9 additional argument. There are some rulings, though, or
10 some of the motions the court is gonna ask specific
11 questions of counsel, and I would appreciate it if
12 counsel would directly answer those questions. I'll ask
13 for arguments as I proceed with the court's own agenda,
14 and to start with, the first item the court would like to
15 take up is defendant's motion for continuance, which is
16 document 508. I've read the pleading, I've read the
17 response. At this time, the court is ready to rule in
18 regards to the motion for continuance. Defendants asked
19 the court to continue the trial in this matter. Having
20 considered the arguments set forth by the parties, and
21 considered the court's calendar and the availability of
22 the jury pool, the court denies defendants' motion. The
23 schedule of the trial will be just as reviewed by the
24 court. So, we're scheduled for trial starting on August
25 19th at 1:30 in the afternoon. There are some

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1 dispositive motions that have been pending before this
2 court, and these are the ones the court is going to rule
3 on. The first motion is gonna be defendants Union
4 Pacific and Burlington Northern Santa Fe's supplemental
5 motion for supplemental ruling in light of the June 26
6 order, which is document 506. Second motion will be
7 defendants Union Pacific and Burlington Northern's motion
8 to strike plaintiff's jury demand for its contract
9 termination and restitution claims, which is document
10 310. The next motion will be defendants Union Pacific
11 and Burlington Northern's motion for summary judgment,
12 dismissing all counts in plaintiff's first amended
13 complaint, which is document 341. The last one will be
14 plaintiff Western Resources' motion for partial summary
15 judgment, which is document 344. Is counsel clear on the
16 order in which we're gonna take up these motions? At any
17 point, if counsel has a question in regards to what the
18 court is addressing or trying to explain a ruling on,
19 please feel free to let me know. As the court is making
20 rulings on some of these motions and dispositive motions,
21 I'm gonna make my record here in court to start with, I'm
22 gonna set out what the court believes plaintiff's claims
23 are at this point. In the amended complaint, plaintiff
24 raises three separate counts. Number one, breach of rail
25 transportation agreements. Number two, breach of

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1 obligation of good faith, and number three, restitution.
2 In its prayer for relief, plaintiff seeks, one, a
3 declaration that defendants have materially breached the
4 contracts. Two, a declaration that plaintiff is excused
5 from further performance under the contracts from the
6 date of defendants' material breach. Three, a
7 declaration that the contracts were void and are of no
8 further force and effect after the date of the material
9 breach. Four, an award of damages at trial. Five, an
10 award of restitution in the amount defendants were
11 unjustly enriched from the date of the material breach by
12 defendants. And six, an award of costs, interests,
13 expenses, and other just relief. As I mentioned, the
14 first motion is going to be defendants Union Pacific and
15 Burlington Northern Santa Fe's supplemental motion for
16 supplemental ruling in light of the June 26 order. Court
17 believes that defendants' argument is that they are
18 moving the court to dismiss plaintiff's claim for quote,
19 retroactive contract termination and restitution for the
20 period following such termination, which is count three.
21 Defendants assert that count three is inconsistent with
22 plaintiff's initial claim for damages and plaintiff's
23 other decisive acts that affirm the contracts at issue in
24 this case. The court has some questions it believes are
25 relevant to issues raised in the pending motion. And the

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1 questions are the following. I've broken these into two
2 different groups. The first group consists of the
3 following questions. What claims has plaintiff raised in
4 its complaint, amended complaint? And specifically the
5 court would ask counsel to answer that question. Number
6 two, what remedies has plaintiff requested, prayed for?
7 And number three, what remedy is sought for what claim?
8 Additionally, what periods of time are addressed by each
9 claim and requested remedy? Again, I've read what's all
10 ready been pled and also response, but the court wanted
11 to have that specifically addressed by counsel. And for
12 Western Resources, who is gonna be the--

13 MR. BODAMER: Your Honor, Brad Bodamer.

14 THE COURT: Okay.

15 MR. BODAMER: You want me to answer those
16 questions?

17 THE COURT: Please.

18 MR. BODAMER: First question, what claims has
19 plaintiff raised in the complaint and the amended
20 complaint? With respect to the complaint, in essence,
21 and I say essence, summarizing, Western Resources sought
22 or claimed that the railroads had materially breached the
23 contracts at issue, 2801, 2802, and sought termination of
24 those contracts and sought damages as a result of the
25 breach. With respect to the amended complaint, basically

1 the same issues, except it was asserted as a separate
2 count three, that the-- again-- material breach and
3 termination of the contract, specifically referencing
4 from and after the date of the material breach, which we
5 allege is April of 1997, or began in April of 1997 and
6 continued even to this day. Would you like for me just
7 to proceed with each one or--

8 THE COURT: Yes.

9 MR. BODAMER: Did you have questions in response
10 to-- okay. What remedies-- second question you ask, what
11 remedies are requested? Western recognizes that it
12 cannot make a double recovery here. It cannot both
13 affirm and disaffirm a contract. We recognize that. But
14 we also believe that we're entitled to seek alternative
15 claims and alternative remedies under the procedural
16 rules of the state of Kansas and the federal rules, and
17 with respect to the claim of material breach, which if
18 this court or jury finds there's been material breach, we
19 believe we're entitled to termination as of the date of
20 the material breach; it would be April of 1997. And if
21 the court or jury determines that the contract was
22 terminated as of that date, then, the essence of our
23 complaint is we have been overpaying since April of 1997
24 by paying the contract rate, which it's our allegation
25 that the contract rate is far in excess of the reasonable

1 value of the services rendered. Again, what's that
2 recognize? It recognizes that in the event that the
3 contract is terminated as of April 1997, we have
4 continued to receive transportation service from the
5 railroad; the court's aware of that. We're not
6 contending that the railroads are entitled to zero or
7 nothing for the services that they rendered. We're
8 simply alleging that what they're entitled to is the
9 reasonable value of those services as opposed to the
10 contract rate, which is nearly double. Item number
11 three-- excuse me, maybe I haven't fully addressed that.
12 So, if there's a material breach, if the court determines
13 that the contract's terminated as of April 1997, we
14 believe under the remedy at restitution or unjust
15 enrichment, that we're entitled to money back. In the
16 event the court determines it's not a material breach,
17 jury determines it's not a material breach, it's simply a
18 breach, we would be entitled to our compensatory damages
19 that were incurred as a result of the railroads' breach.
20 Number three, what remedy is sought for what claim?
21 Well, maybe I've all ready addressed that, but again, the
22 remedy of restitution in the event of a finding of
23 material breach and termination; compensatory damages, in
24 the event the court determines-- court or jury determines
25 that no material breach, no termination, no entitlement

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1 to restitution, then clearly we've been damaged, and we'd
2 be entitled to our compensatory damages for this-- for
3 the breach. Number four, what period of time was
4 addressed for each, or is addressed for each? The-- as
5 we've alleged, the material breach began in April of
6 1997, and has continued to this day. But as far as the
7 restitution claim, if we're correct and it was April 1997
8 or some date after that, then the restitution claim would
9 be from the date that the court or jury determines
10 there's been a termination up until the present time,
11 'cause we continue to pay at the contract's rate to this
12 day. With respect to the compensatory damage claim, the
13 alternative claim, beginning in 1997, April of 1997,
14 really continuing through 1998, there was a serious
15 deficiency in service resulting in four or five different
16 categories of damages that incurred throughout that
17 period of time. Service improved in 1999, but even
18 during that improvement of service, it's Western's
19 contention that we continued to receive inefficient
20 service and that we were required to put in service more
21 train sets than we should be required to place in service
22 under the contract, and therefore, that would be an item
23 of damage that would continue during that-- even during
24 that period of time, and then there was a return to
25 deficient service in 2001, again Western went into coal

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1 conservation, which means cut down on production
2 starting-- seeking alternative, or excuse me, went into
3 conservation and reduced its production, and we're
4 seeking damages for the 2001 period as well. I believe
5 I've addressed your questions. Do you have any --

6 THE COURT: I have two follow-up, yes.

7 MR. BODAMER: Yes, sir.

8 THE COURT: At what point does the plaintiff
9 believes it's required to elect its remedy, and is there
10 the availability, and through what authority for this
11 partial rescission that the plaintiff is requesting?

12 MR. BODAMER: We're not seeking partial rescission.
13 We're seeking-- and I realize the railroads-- that's the
14 way they phrased it. What we're seeking is the remedy of
15 termination, not rescission, which would be retroactive to
16 the date of the contract in 1994, but termination as of
17 April of 1997. Termination as a result of a material
18 breach, and the authorities, I think are clear, that in
19 the event of a material breach, it does excuse
20 performance, and that's what we're contending.

21 THE COURT: Thank you.

22 MR. BODAMER: Is that it?

23 THE COURT: Yes, at this point. Defendant, Mr.
24 Weinstein, is that correct?

25 MR. WEINSTEIN: Yes, good morning, Your Honor.

1 THE COURT: Good morning.

2 MR. WEINSTEIN: May it please the court, if I may
3 take first the-- what I believe was the final question
4 that you put to Mr. Bodamer. Railroads, the defendants,
5 do not understand what the request for relief in the
6 amended complaint as to count three of the amended
7 complaint could be, if it is not something in the area of
8 restitution. The only three remedies allowed for breach
9 of contracts are rescission and restitution, compensatory
10 damages, and specific performance. The kind of
11 termination that is being-- that Mr. Bodamer was speaking
12 of on behalf of the plaintiff is a forward looking remedy
13 associated with a material breach of contract, but it's
14 not a retroactive remedy under the law, and to turn to
15 the questions that Your Honor put to counsel a few
16 moments ago, we think that the difference between the two
17 complaints is found in the addition of count three in the
18 amended complaint, headed restitution. There is nothing
19 like that in the original complaint, and that is what is
20 entirely new. In addition, the prayer for relief has
21 been changed in a legally significant way, and a-- and in
22 a dramatically, significant way, when the plaintiff has
23 gone from the original complaint to the amended
24 complaint. In the original complaint, the plaintiff, I
25 believe, phrased its prayer for relief, paragraph little

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1 A, in what we would suggest is the normal way for a party
2 who comes into court, declares there's a-- been a
3 material breach of contract, and claims freedom from
4 further performance. It says that-- it asks that the
5 court declare a material breach, and that Western
6 Resources is excused from further performance under the
7 contracts, and the contracts are void, and are of no
8 further force and effect. That's quite standard in a
9 case that asserts a material breach. The Fusion case in
10 this court decided by Judge Lungstrom a couple of years
11 ago is an example of a case where a party comes in and
12 says, as of a specified date, the other side is in
13 material breach, and from that date forward we should be
14 excused from performance. Now, what is new in the
15 amended complaint and for which we suggest there is no
16 legal precedent whatever, is the change in paragraph A of
17 the prayer for relief to put in the statement that the
18 contracts were void and are of no further force or effect
19 after the date of the material breach, coupled with the
20 factual allegations under the new count three, which are
21 found essentially in paragraphs 57 through 60, which
22 assert now instead of the claim for future relief from
23 the obligations of the contract, which was the gravamen
24 of paragraph A of the prayer for relief in the original
25 complaint, incorporates here in these paragraphs, 57

NANCY MORONEY WISS, CSR, RMR

1 through 60 together with the new prayer for relief, A,
2 the demand for partial retroactive rescission, coupled with
3 restitution of close to half of the amounts that had been
4 paid for transportation services since April 1997. And I
5 believe that that answers Your Honor's question. If I--
6 or series of questions. If I may comment very briefly on
7 Mr. Bodamer's suggestion that changes in pleadings rules
8 in Kansas permitted the defendant, I'm sorry, the
9 plaintiff, to pursue these inconsistent remedies in the
10 way they have, by complaint and amended complaint,
11 coupled with all the actions that we put into our motion
12 for supplemental ruling, the actions since late 1999,
13 which specifically come out of the contract and are
14 viewed, constitute further reaffirmance of the contract.
15 The affirmance/disaffirmance rule is a substantive rule
16 of contract. It is not one that is overcome by changes
17 in pleadings rule. In fact, we would point out to the
18 court that the Lehigh case which comes after the 1964
19 change in the procedural rules in Kansas and on which the
20 plaintiff relies in opposing our motion for supplemental
21 ruling, relies entirely on a case called Lindsey v.
22 Keiming, K-E-I-M-I-N-G, which was decided in Kansas
23 before the change in procedural rules. So, those changes
24 in procedural rules have nothing to do with the substance
25 here. The substance we suggest remains, that if a party

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1 with full knowledge of the facts, as Western had when it
2 filed its case in January of 2000, files a pleading
3 seeking only prospective relief under a theory of
4 material breach, which is what the original complaint
5 did, then it has made its selection to affirm the
6 contract, and it cannot subsequently come in with a
7 changed complaint and seek to disaffirm the contract by
8 claiming this form of partial rescission and restitution,
9 Your Honor.

10 THE COURT: Thank you. The court is ready to rule
11 in regards to this motion. The court rules in the
12 following manner. Again, after consideration of the
13 arguments raised in the pleadings as well as what's been
14 supplemented here at our hearing, the court finds that
15 plaintiff's complaint raises a claim for breach of
16 contract which includes breach of good faith claim. The
17 court further finds plaintiff has requested the following
18 remedies: Number one, damages. Number two, partial
19 rescission of contract as of date of the breach. And
20 number three, restitution. I know, Mr. Bodamer, you said
21 that you're not requesting partial rescission. The court's
22 still gonna make a ruling in regards to that, because it
23 believes that part of that, or the partial rescission was
24 at least raised in the pleadings, and it's been addressed
25 here as well by counsel, defendants' counsel. The court

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1 finds that partial rescission is unavailable under Kansas
2 state law. Kansas law clearly holds that a rescission must
3 be total rather than partial. A party to a contract may
4 not quote, affirm in part and repudiate in part, end
5 quote, nor can a party to a contract, quote, claim or
6 retain advantages under the contract and evade its
7 disadvantages, end quote, and that's from Dutton versus
8 Dutton, 113 Kansas 146. Moreover, where rescission of a
9 contract is requested, quote, it must be rescinded in
10 total, if at all, end quote, in the same case. Moreover,
11 it is questionable whether the typical remedy for
12 rescission is available in this case. That is, it is
13 questionable whether given the length of performance
14 under the contracts, the parties may, quote, be placed in
15 substantially the same condition as they were in when the
16 contracts were executed, end quote. And that's from a
17 case of M & W Development, Incorporated versus El Paso
18 Water Company, at 634 Pacific 2nd, 166. Therefore, the
19 court finds that plaintiff has elected the remedy of
20 damages for the alleged breach of contract at issue here.
21 Accordingly, defendants' motion for supplemental ruling
22 is granted in part, as noted on the record. Next matter
23 is defendants Union Pacific and Burlington Northern's
24 motion to strike plaintiff's jury demand for its contract
25 termination and restitution claims. Again, the court

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1 has, prior to this hearing, reviewed the pleadings that
2 were filed in this matter. I've also reviewed what the
3 court believes to be the applicable law. The court's
4 ready to rule. Based on the court's ruling that's just
5 been made that plaintiff has elected the remedy of
6 damages, the court finds the issues raised in this motion
7 are moot. First, as noted, the court finds plaintiff may
8 not seek a remedy of partial rescission under Kansas law.
9 Therefore, whether plaintiff is entitled to a jury trial
10 on that claim is moot. Second, the court believes that
11 based on its rulings, the amounts prayed for in
12 plaintiff's complaint as restitution are actually
13 available to plaintiff, if proved as damages, based on an
14 unjust enrichment quantum meruit theory. And the court
15 would note that the case of Sharman versus Webber Supply
16 Company at 201 Kansas 507, held that compensation based
17 on the doctrine of quantum meruit is allowable for
18 partial performance, but the terms of the contract must
19 be taken into account, and the amount of recovery must be
20 based on the benefits conferred on the other party to the
21 contract, less a proper set-off for whatever damages may
22 have been sustained by the other party by reason of the
23 breaching party's failure to complete the contract.
24 There's also a case of Fritts versus Quinton,
25 Q-U-I-N-T-O-N at 118 Kansas 111, holding that

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1 compensation on quantum meruit was allowable for the
2 partial performance of personal services, but the terms
3 of the contract must be taken into account, and the
4 amount of recovery must be based on the benefits
5 conferred on the other party to the contract, less any
6 damages sustained by such other party by reason of the
7 breach of contract. Plaintiff has a right to a jury on
8 these claims for damages as contemplated in the Pattern
9 Instructions in Kansas, section 124.17. Defendants'
10 motion to strike is denied. Next motion is defendants
11 Union Pacific and Burlington Northern's motion for
12 summary judgment dismissing all counts in plaintiff's
13 first amended complaint, which is document 341.
14 Defendant seeks summary judgment on all three of
15 plaintiff's claims. First, defendants contend that the
16 uncontroverted facts established no breach of the
17 relevant agreement occurred. Second, defendants contend
18 they are entitled to judgment as a matter of law on
19 plaintiff's breach of the obligation of good faith claim,
20 because Kansas law does not recognize a separate cause of
21 action as captioned by plaintiff. Finally, defendants
22 contend they are entitled to summary judgment on
23 plaintiff's restitution claim, because plaintiff cannot
24 establish entitlement to rescission, restitution, because
25 no material breach occurred, and because the claim is

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1 barred by a doctrine of agreed equivalence and by
2 implied, in fact, contract principles. In regards to the
3 breach of contract claim which the court is gonna take up
4 first, let me again make a record that the court believes
5 defendants are contending that they are entitled to
6 summary judgment on plaintiff's breach of contract claim
7 because the uncontroverted facts establish no breach
8 occurred. Specifically, defendants contend, number one,
9 no cycle time or other timeliness standard was
10 contemplated in the contract. Number two, the contract
11 does not require defendants to transport all of
12 plaintiff's coal requirements to JEC. Number three, that
13 the contract does not limit the number of trains or rail
14 cars that plaintiff may need to supply. And number four,
15 that the contracts prefatory, quote, whereas, end quote,
16 clause imposes no obligations on defendants. Moreover,
17 defendants contend that because the contract contains an
18 integration clause, the contract constitutes the entire
19 agreement between the parties. Accordingly, defendants
20 argue that under the explicit terms of the agreement,
21 they were not obligated to perform the actions that
22 plaintiff claims constituted breach of the agreement. In
23 regards to integration, the court rules in the following
24 manner. Again, I'm familiar with the arguments that were
25 raised by counsel in their pleadings, and the court

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1 believes it's ready to rule. First, the court finds that
2 the contract at issue is fully integrated within the
3 meaning of the Kansas parole evidence rule. That's
4 Kansas Statute Annotated section 84-2-202. Defendants'
5 motion is granted to the extent it seeks a ruling
6 regarding integration. Article 22 of the agreement
7 specifies, this agreement compromises the entire
8 agreement, merging and superseding all prior
9 understandings and representations between shipper and
10 railroads regarding the subject matter of this agreement.
11 No subsequent agreement amending, supplementing,
12 modifying, or terminating this agreement shall be binding
13 on the railroads or shipper, unless it is in writing and
14 executed by the respective authorized representatives,
15 and to the extent required by applicable regulations
16 filed with and approved by the ICC, in accordance with 49
17 U.S.C. Section 10713, as amended from time to time. And
18 that's from contract ICC-BN-C-2801 at Article 22.
19 Accordingly, by the contract's expressed terms, the
20 contract constituted the entire understanding between the
21 parties. Moreover, the court may consider when
22 determining whether the parties intended the agreement to
23 be their final, complete agreement, quote, whether the
24 parties involved are merchants who had equal bargaining
25 power with respect to the subject matter of their

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1 transaction, end quote. And that's from a case of Ray
2 Martin Painting versus Ameron, Inc. at 638 Fed. Supp.
3 768. In this case, the evidence, when construed in the
4 light most favorable to the plaintiff as the non-moving
5 party, establishes that both plaintiff and defendants
6 were experienced in negotiating agreements regarding the
7 transportation of coal by rail, and were represented by
8 counsel during at least part of the negotiations leading
9 up to the execution of the agreement. In addition, the
10 negotiations were not hurried, as the current agreement
11 was the culmination of over several years of negotiations
12 between the parties. Court-- courts, quote, are less
13 reluctant to hold educated businessmen to the terms of
14 contracts to which they have entered-- entered than
15 consumers dealing with skilled corporate sellers, end
16 quote. That's from Univeral Drilling Company versus
17 Camay Drilling Company at 737 Fed. 2nd, 869. Given the
18 presence of the integration clauses in this extensively
19 negotiated agreement, and recognizing the sophistication
20 of the parties, the court finds as a matter of law that
21 the parties intended the agreement to be final and
22 exhaustive. Accordingly, the court must construe the
23 contract's terms as written, rather than referencing
24 extrinsic evidence to determine the parties' intent as to
25 the contract's terms and obligations. However-- and that

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1 was from Kansas Statute Annotated, section 84-2-202.
2 However, where necessary in such interpretation, the
3 common law rules regarding exceptions to the parole
4 evidence rule shall apply. And that's from section
5 84-2-202, comment number four, noting, quote, the
6 traditional common law exceptions to the parole evidence
7 rule continue to apply, end quote, under statutory
8 provision regarding parole evidence. In regards to the
9 effect of the prefatory clause, the whereas clause, the
10 court rules again, after considering your pleadings. As
11 a matter of law, the court would find the defendant's
12 motion for summary judgment is granted, to the extent it
13 asks the court to find no independent obligation is
14 created by the fourth quote, whereas, end quote, clause
15 at issue here. However, the motion is denied to the
16 extent it seeks court to find no timing or efficiency
17 standard is imposed by contracts as a whole, based on an
18 examination of this whereas clause. The fourth whereas
19 clause at issue here provides quote, whereas the parties
20 further desire that the contractual arrangement promote
21 maximum equipment utilization and efficiency, end quote.
22 Plaintiff appears to contend that this provision either--
23 either alone or all read in conjunction with other
24 operative parties of the contract, imposes a timeliness
25 standard on the parties' contracted obligation. The

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1 court agrees with defendants that considered in
2 isolation, this whereas clause creates no independent
3 obligation upon the parties. However, when determining
4 the parties' intent, quote, all the language used
5 anywhere in the instrument should be taken into
6 consideration and construed in harmony with other
7 provisions of the contract, end quote. That's from the
8 case of Texaco, Inc. at 336 Fed. 2nd at 233.
9 Accordingly, the court finds that this provision may be--
10 may be considered when interpreting other operative
11 provisions of the contract. However, the court notes
12 that it is the granting clause, not the whereas clause,
13 that is quote, paramount in determining what interest was
14 intended to be granted, end quote, by the contract.
15 That's from Lathrop versus Eyestone, 170 Kansas 419.
16 Accordingly, end quote-- beginning quote, where there is
17 a conflict between specific provision and a general
18 provision, preference is given to the specific provision,
19 end quote. That's from Amoco Production Company versus
20 Wilson, JR, Inc., at 266 Kansas 1084. The court is going
21 to request arguments on the next part of this, which has
22 to do with the contract construction. Specifically,
23 regarding construction of specific contract terms,
24 defendants' argument, as noted, defendant asks the court
25 to find as a matter of law, number one-- this is

NANCY MORONEY WISS, CSR, RMR

1 important, counsel, put these in order-- number one, that
2 no cycle time or other timeliness standard was
3 contemplated in the contract. Number two, that the
4 contract does not require defendants to transport all of
5 plaintiff's coal requirements to JEC. Number three, that
6 the contract does not limit the number of trains or rail
7 cars that plaintiff may need to supply. Defendants then
8 ask the court to find under this interpretation of the
9 agreement, the uncontroverted facts establish no breach
10 occurred as alleged by plaintiff. Because the
11 construction of a written instrument is a question of
12 law, it is the court's responsibility to construe the
13 terms of the contracts at issue here. To assist the
14 court with that task, the court would like to hear
15 arguments regarding the disputed terms, the ones the
16 court has just identified as one, two, and three.
17 Specifically, the court would like for each party to
18 answer, with respect to the three disputed terms raised
19 by defendants' pending motion, the following questions.
20 And the questions for each of the disputed contract terms
21 are: Number one, what is the relevant contract language
22 the court must consider? Number two, does this relevant
23 language make this contract term ambiguous or
24 unambiguous? And if it is ambiguous, what, if any, is
25 relevant extrinsic evidence that the court should

NANCY MORONEY WISS, CSR, RMR

1 consider to construe this term? Number three, what is
2 the proper construction of the disputed contract term?
3 In regards to the first one, which again had to do with
4 the cycle time or timeliness standard, the second one had
5 to do with the allegation the contract does not require
6 defendants to transport all of plaintiff's coal
7 requirements. Number three, that the contract does not
8 limit the number of trains or rail cars. Those three
9 questions are the ones the court would ask on each one of
10 those disputed areas. Start with defendant. Mr. Wein--
11 I'm sorry, Mr. Sipe.

12 MR. SIPE: Morning, Your Honor, Sam Sipe.

13 THE COURT: Yes.

14 MR. SIPE: The contract, I'm sure you're quite
15 familiar with, and it's marked as Exhibit 19 to our
16 motion, and I'm going to be referring to specific
17 provisions, and I may, in one or two instances, put up a
18 board that has some excerpts from the contract language.
19 First of all, no cycle time or other timeliness standard,
20 and the first question there is to point to specific
21 contract language that we rely upon. We rely, Your
22 Honor, on Article 5 B of the contract, which is found at
23 page 15, I believe, captioned train cycle time and
24 tonnage. Not later than each November 1 during the term
25 of this agreement, railroad shall provide to shipper its

1 non-binding projected cycle times for the next calendar
2 year by month, for trains moved pursuant to this
3 agreement. By expressly stating that the cycle time
4 furnished from the defendants railroads to Western is
5 non-binding, the contract eschews a cycle time standard.
6 And there is no other provision of this agreement from
7 which such a standard can be determined, and I'm not
8 gonna take the court through every other-- obviously
9 every other section of the agreement. Western hasn't
10 pointed to one. Now, would you like me to address each
11 of your three questions that relate first to this no
12 cycle time standard?

13 THE COURT: Yes.

14 MR. SIPE: Or would you-- okay, and then I'll go on
15 to the requirements as a second set.

16 THE COURT: Please.

17 MR. SIPE: Is this language ambiguous or
18 unambiguous? It's unambiguous, Your Honor. The
19 plaintiffs have acknowledged in their pleadings related
20 to the summary judgment motions that the contract is
21 unambiguous. They've not attempted to point out any
22 ambiguity with respect to this provision, or any other
23 provision that I'm aware of. And I don't think there's a
24 dispute between the parties on this. What is the proper
25 construction of the term that I've just referred to?

1 That's your third question, Your Honor?

2 THE COURT: Yes.

3 MR. SIPE: The proper construction is that the
4 parties agreed that for planning purposes, the railroads
5 would tell Western approximately how long they
6 anticipated it would take trains to complete a round trip
7 cycle in the next calendar year. But the railroads were
8 not making any commitment to cycle the trains within a
9 particular period of time.

10 THE COURT: Okay.

11 MR. SIPE: And I believe that responds to all of
12 the questions on the first point.

13 THE COURT: Thank you.

14 MR. SIPE: No requirements-- the first question
15 here is, what is the relevant language in the contract to
16 establish our proposition that the railroads have no
17 obligation to transport Western's requirements to the
18 Jeffrey Energy Center? Well, there is no provision in
19 the contract that specifically refers to requirements.
20 Therefore, once again, and this is a little bit like
21 trying to prove a negative, I can't take you through the
22 agreement and show you, it would be a waste of all of our
23 times to show you every provision of the agreement that
24 fails to say anything about transporting the railroads'
25 requirements. But what I can show you is an excerpt from

1 two of the key provisions here, which state the
2 railroads' version of what their obligation is. It's not
3 to transport Western's requirements. The obligation--
4 let me turn this so the court can-- can see it. Is that
5 clear? Can you see it, Mr. Bodamer?

6 MR. BODAMER: I'll move over.

7 MR. SIPE: The obligation is not to transport
8 requirements. The railroads' obligation is to transport
9 all coal loaded in rail cars and tendered by shipper at
10 origins, and to deliver those loaded rail cars to
11 destination. That's Article 3 A, and what we've
12 indicated on the board here is that Article 5 A 1, which
13 Western seems to have relied on for inferring the
14 requirements obligation, is totally consistent with
15 Article 3 A. Both these form-- under both these
16 formulations, 3 A and 5 A 1, railroads shall transport
17 all the coal Western loads in rail cars at origins.
18 Railroads have no obligation to transport any coal that
19 is not loaded in rail cars. And that is the essence of
20 our obligation, and it's the essence of our response on
21 the requirements issue. Is this language ambiguous or
22 unambiguous? It's unambiguous, Your Honor. Western has
23 not questioned the meaning or significance of any of the
24 terms in either of these provisions. They say in one of
25 their papers that we ignore section 5 A 1, but we clearly

1 don't ignore section 5 A 1. And finally, the third
2 question on this point, what is the proper construction
3 of the adopted term? The proper construction is that the
4 railroads transport all the coal that Western loads at
5 the origins. Western is responsible for loading the
6 trains. That responsibility is found, I believe, in
7 Article 6 C. When Western loads the trains, the trains
8 are tendered to the railroads, and the railroads
9 transport them to Jeffrey. How does Western get the coal
10 it needs? It gets the coal it needs by putting in the
11 number of train sets it thinks is needed to do the job
12 under the circumstances. And over the life of the
13 contract, given Western's needs at Jeffrey, and given the
14 railroads' varying cycle times, Western has put in train
15 sets ranging in number from 5 to 12, and I think the way
16 to think about the way this contract is structured, Your
17 Honor, is that Western does have a means of controlling
18 the flow to Jeffrey. It is a valve that is not the most
19 precise valve that Western could have bargained for, but
20 they didn't want to bargain for a cycle time standard, as
21 we've all ready seen, and so, they bargained for a
22 mechanism that allows them to control the amount of coal
23 they get by the number of trains they put into the
24 contract. And that leads directly to the final question
25 that you had, which is, final series of questions, no

NANCY MORONEY WISS, CSR, RMR

1 limit-- railroads contend that there is no limit on the
2 number of trains that Western must supply. And the
3 provisions of the contract we rely on, Your Honor, are
4 Article 4 A 1, at page 6 of contract 2801. Shipper shall
5 furnish sufficient rail cars, including spares, to
6 assemble trains of 115 rail cars for shipments under this
7 agreement at no charge to railroads, except as otherwise
8 provided in this agreement. And I would also direct the
9 court's attention to Article 6 A of this agreement. If
10 shipper provides sufficient empty shipper supplied rail
11 cars to railroads, railroads shall assemble trains of not
12 less than 115 cars for movement to and loading at
13 origins. There's no limitation on the number of trains
14 that Western is to furnish or that the railroads are to
15 accept into service under either of these provisions,
16 Your Honor. Clearly, it would have been possible for the
17 parties to insert a numerical limitation of some sort.
18 But there is none. And as I said, in practice, the
19 number of train sets has varied from 5 to 12 over the
20 course of this contract. Is this language unambiguous or
21 ambiguous? Again, it's unambiguous. We don't believe
22 Western has argued to the contrary. And finally, what is
23 the proper construction of the two provisions I've just
24 referred you to here? The proper construction is that
25 Western is responsible for putting train sets into

NANCY MORONEY WISS, CSR, RMR

1 service. That's how it controls the amount of coal it
2 gets, and there's no limitation on the number of train
3 sets Western is required to put into service or the
4 number that the railroads should accept, if Western
5 tenders those train sets. I believe I've addressed the
6 court's questions, but if you have any follow-ups, I'd be
7 happy to try to answer them.

8 THE COURT: Thank you. Is that Mr. Bodamer?

9 MR. BODAMER: Yes, sir.

10 THE COURT: Is that correct?

11 MR. BODAMER: If I might, could I ask the court a
12 question as to the court's appreciation for the practical
13 operations of the subject matter in this contract? And
14 again, I don't-- I want to address your questions, but
15 I-- coming into this case within the last year and not
16 knowing anything about how this worked, I got off on all
17 kinds of detours, and I don't know if I can-- and I'm
18 not-- I'm hopeful you haven't gotten off on any of those,
19 but to the extent it might be helpful, I thought I could
20 just cover a couple of items.

21 THE COURT: You can. I would tell you that I am
22 pretty familiar all ready with what's before the court,
23 but if it's gonna help you make a record or maybe lead
24 into addressing what the court's brought up, then feel
25 free to do so.

1 MR. BODAMER: Okay. And this really does tie in to
2 the first question about, you know, is there a specific
3 cycle time standard or other timeliness requirements?
4 And let me address that. Is there a specific cycle time
5 standard? In other words, do they-- do they have to
6 cycle these trains between the mines in Wyoming to
7 Jeffrey Energy Center and back to the mines in 90 hours
8 or 95 hours or 100 hours, does a contract say that? No,
9 it does not say that. Does that mean there is no
10 timeliness obligation whatsoever? And I say that's
11 ludicrous to suggest that. It would result-- it would
12 result in an absurdity, which this court knows is to be
13 discouraged in interpreting a contract, and it would in
14 effect render the contract illusory, 'cause there would
15 be no obligation, because the railroads would have in
16 their total control the amount of coal that they were
17 gonna ship, because they could simply avoid or prevent us
18 from receiving the coal we need, by either delaying the
19 loaded trains from the mines to Jeffrey Energy Center, or
20 delaying or stopping the return of the empty cars or
21 trains back to the mines. And that-- and that leads me
22 to what's really going on here. I mean, this plant was
23 built in 1978. First contract between these parties or
24 some of these parties was entered into in 1972, and the
25 10th Circuit discusses this, you know, in the KPL, our

NANCY MORONEY WISS, CSR, RMR

1 predecessor, versus BN case, the parties both were
2 interested in developing the Powder River Basin. We
3 needed-- we were gonna build a plant that would use this
4 high energy, low sulphur coal. The place you find that
5 is in the Powder River Basin, and railroads were
6 interested in getting that business. There was mutual
7 interest in establishing a relationship, and that was
8 done. And for fifteen years, between 1978 and 1993,
9 these trains cycled between the Powder River Basin and
10 Jeffrey Energy Center and back to the Powder River Basin.
11 And they did that in a cycle. That's where this whole
12 idea of cycle time comes up. Now, also, I think it's
13 worth reminding the court, there's only one source of
14 coal that's burned at Jeffrey Energy Center, and that's
15 the Powder River Basin, and there's only one source of
16 transportation for that coal, and that's either the BN or
17 the UP or some combination of both, and as you know,
18 under these contracts, it is a joint move. Now, this
19 contract required the-- the-- Western to ship and for the
20 railroads to transport 6 million-- either the greater of
21 6 million tons or 100 percent of all coal shipped from
22 the Powder River Basin to Jeffrey Energy Center. Note
23 that there's a minimum there, but no maximum. It was an
24 unlimited obligation. Neither the railroads nor Jeffrey
25 knew exactly how much coal they would be needing or would

NANCY MORONEY WISS, CSR, RMR

1 be shipping under this agreement. Now, is there a
2 timeliness standard? And the answer to that question is,
3 yes. Upon what do we base that? What are the relevant
4 con-- what is the relevant contract language that the
5 court must consider? I'll start with 5 A, which is what
6 I just referred to. The minimum annual volume, and note
7 that the railroads talk about Article 3-- excuse me-- 3
8 A, to support their argument that all they're obligated
9 to do-- to transport is what's loaded in rail cars and
10 tendered by shipper at origins. But please note that
11 Article 3 really deals with the nature of the service or
12 how those services are gonna be provided. It deals with
13 the transportation of the loaded cars, the return of the
14 empties, and the routes that are gonna take place. But
15 if you look at Article 5, 5 A, shippers volume
16 commitments, and 5 A, the minimum annual volume, that
17 deals, really, with how many-- what's the quantity that's
18 gonna be shipped here. And again, there's a minimum but
19 no maximum. It's an unlimited obligation, at least in
20 the specific terms of the contract, not unlimited in the
21 sense that, as the court's aware in the requirements
22 situation, there is some obligation in good faith on the
23 part of Western to ship its requirements and no more than
24 its requirements. The other provision the court should
25 look at is Article 4 A, rail car supply. Shipper shall

NANCY MORONEY WISS, CSR, RMR

1 furnish sufficient rail cars-- it's not specific as to
2 how many rail cars, it says sufficient rail cars-- to
3 assemble trains of 115 rail cars for shipments. And so
4 the court's aware, these trains-- this was the minimum.
5 The standard was about 119 cars. You cannot get more
6 than a 119. In other words, we didn't just have extra
7 rail cars we could tag on at the end. And again, I'd ask
8 the court to look at 4 G which deals with what the
9 railroads are obligated to provide, and under 4 G, the
10 railroads shall provide the necessary locomotives,
11 cabooses, and end of train devices, related transportation
12 facilities, equipment, and personnel needed for
13 railroads' provision of transportation under this
14 agreement. Now, granted, I left out the word sole
15 discretion, and they are in there. But again, as this
16 court's aware, the obligation in good faith and fair
17 dealing says that sole discretion does not mean unlimited
18 discretion. It still has to be exercised in good faith.
19 And then I would bring the court back to the whereas
20 clauses. First whereas clause acknowledges or references
21 entering into a supply contract for Powder River Basin
22 coal. It references how the shipper will cause to be
23 loaded and the railroads will transport the coal
24 originating at the mines located in the Powder River
25 Basin. Third whereas clause, the parties desire to

1 provide for transportation, equipment, service, and
2 volume commitments, as well as a few-- as other things,
3 and then fourth, they desire that the contractual
4 arrangement promote maximum equipment utilization and
5 efficiency. Now, I respect the court's opinion. I agree
6 with the court's opinion, that those are not operative
7 provisions. But those cannot be completely ignored in
8 construing this contract. And if you construe all these
9 provisions as I've laid out, there can be but one
10 conclusion, that these parties were gonna enter into a
11 long term contract, a 20 year contract, for the
12 transportation of all the coal Western needed to burn at
13 Jeffrey Energy Center, and that the railroads were gonna
14 provide the necessary equipment to move that coal, and
15 Western was gonna provide sufficient rail cars to move
16 that coal. But if you accept the railroads' argument
17 that there's no timeliness standard, then again, it
18 results in an absurdity. They could delay or park
19 trains, which they did at '97 and '98, to the detriment
20 of Western, impacting adversely the operations of the
21 Jeffrey Energy Center. Now, I've covered a lot, and I
22 didn't do it in the exact order that you asked for, and I
23 hope it was still helpful. But I've talked-- I have
24 talked about the relevant contract language you must
25 consider. Is it ambiguous? No, I don't-- we're not

NANCY MORONEY WISS, CSR, RMR

1 contending it is ambiguous. These parties knew what they
2 were entering into in the sense of a long-term contract,
3 subject to fluctuations and variations. But the issue
4 was not unlimited fluctuations or variations. There is
5 still a standard imposed by good faith and fair dealing.
6 There's also a-- and there's also the legal standard in
7 construing a contract that no specific time provision is
8 set forth, that a reasonable time would apply. And
9 finally, what is the proper construction of the disputed
10 contract terms? Again, I would ask the court, as you all
11 ready have indicated, to construe the entire contract,
12 all provisions of the contract, in harmony to effectuate
13 the purpose and the intent of the parties, as opposed to
14 some absurd result. And if you do that, it's our
15 position that you'll find, then, it is a contract for the
16 transportation of coal, not just coal, but all coal, that
17 Jeffrey needs to operate the Jeffrey-- excuse me-- that
18 Western needs to operate the Jeffrey Energy Center from
19 which there's only one source, the Powder River Basin,
20 and for which there's only one source of transportation,
21 these defendants. One final point. You ask an issue
22 about no limit on rail cars it must supply. There--
23 granted is, there was gonna be fluctuation in the amount
24 of coal that was gonna be transported. The more coal you
25 transport, the more trains, assuming the cycle time

NANCY MORONEY WISS, CSR, RMR

1 remains the same, the more coal you're gonna transport,
2 the more trains it's gonna take, you know, to move that
3 coal. And that's why the issue of sufficiency, didn't
4 say an exact number, talked about sufficient cars. But
5 to say that there's no limit, again, is ludicrous. And
6 in fact, probably the best evidence of that is that at
7 the time when we needed the coal the most and needed to
8 put additional train sets in service to move that coal,
9 '97 and '98, was the very time when the railroads were
10 saying, you can't add train sets, because we can't handle
11 'em. We don't have the necessary equipment. It will
12 only further the congestion. So, is there a limit on the
13 rail cars? Sure. It's the amount that's reasonable in
14 order to meet the other obligations set forth in this
15 agreement, and that is, again, to transport this coal
16 under a reasonable cycle time where both parties exercise
17 good faith, in terms of nominating the coal and in
18 providing the equipment they need in order to move that
19 coal. That's-- unless you have further questions, I'll
20 sit down.

21 THE COURT: Thank you.

22 MR. BODAMER: Thank you.

23 MR. SIPE: Your Honor, if I may, briefly, I think
24 Mr. Bodamer-- and this is not an ad homonym reference-- I
25 think he took some liberties with your order, and I would

1 just like to address two of the points he made, if I may,
2 very briefly.

3 THE COURT: Yes.

4 MR. SIPE: First of all, I think the essence of
5 their argument that we've heard here is that you can't
6 read the contract literally according to what it says,
7 according to what they agree is the unambiguous language,
8 because that would be ludicrous, ridiculous, repeatedly
9 said. So, he's saying you can't believe that we would
10 have entered into a contract that the railroads could
11 take to ridiculous extremes by not moving any coal.
12 First point, Your Honor, is, we don't decide summary
13 judgment motions based on hypotheticals. We decide them
14 based on the facts in the record and presented to the
15 court. And nobody is contending here that the railroads
16 took weeks or months to move the trains. Yes, it took a
17 long time to move the trains in 1997 and '98, longer than
18 the railroads wanted it to, and that was the worst rail
19 service crisis in recent memory, as they remind us, but
20 they got 92 percent of their coal then. So, we're not
21 talking about the ludicrous interpretation that might
22 arise if the railroads never moved the trains, because we
23 did move the trains. More slowly than we wanted to, but
24 we moved them. And that's precisely the risk Western
25 accepted under this agreement. The railroads have every

NANCY MORONEY WISS, CSR, RMR

1 incentive to move the trains, because we only get paid
2 for the coal we deliver. When the trains run slowly, we
3 make less money, and that's what happened in '97 and '98.
4 That was not good for us. We have no incentive
5 whatsoever to ever perform in the way Mr. Bodamer
6 describes in the hypothetical. The second point I wanted
7 to make, Your Honor, has to do with a very specific
8 factual issue about accepting train sets into service in
9 1997 and 1998, which Mr. Bodamer alluded to. There is a
10 factual issue in the case as to whether on two instances,
11 one in late 1997, one in mid-1998, the railroads accepted
12 an additional train set, sufficiently, promptly, to
13 comply with their obligations under the contract. There
14 are references to that in the record. The key point on
15 this, Your Honor, however, is Western has claimed no
16 damages flowing from this alleged brief delay in
17 accepting those two train sets into service. And for
18 purposes of sustaining a claim, they've not only got to
19 allege a breach, they've got to allege harm flowing from
20 that breach, and damages incurred as a result of those
21 two train sets, perhaps, being delayed somewhat in
22 putting-- in being put into service. Given their failure
23 to allege damages, we believe it would be appropriate for
24 the court to grant summary judgment, notwithstanding
25 those facts. Thank you, Your Honor.

NANCY MORONEY WISS, CSR, RMR

1 THE COURT: Have a question for you.

2 MR. SIPE: Yes, sir.

3 THE COURT: Plaintiff in his argument relies on the
4 whereas provisions of the contract, and is arguing that
5 those provisions should also be taken into account when
6 the court makes a ruling in regards to these issues. Do
7 you have a position in regards to that?

8 MR. SIPE: Well, of course, I heard your prior
9 ruling, Your Honor, and if I understand the ruling
10 correctly, what you said is, the whereas clause does not
11 establish an independent obligation. It is the operative
12 terms that establishes the obligations. If there were
13 some specific language in the contract which were somehow
14 amplified by the whereas clause, under your ruling that
15 you've got to read all the language, then perhaps the
16 whereas clause might, under your ruling, have some
17 significance. But I don't think they've pointed you to
18 any contract language that is amplified by the whereas
19 clause, and I think it might be helpful in this context
20 to think about Judge Lungstrom's decision in the Thompson
21 case, and Professor Farnsworth's distinction between
22 operative terms that are unambiguous and whereas clauses.
23 And what Judge Lungstrom found and what Professor
24 Farnsworth said is, that where the operative provision is
25 unambiguous, and you heard Mr. Bodamer concede that the

1 terms of the contract are unambiguous, the whereas clause
2 basically has little or no weight.

3 THE COURT: Thank you. Anything else, Mr. Bodamer?

4 MR. BODAMER: Your Honor, if I might, just briefly.
5 What you just heard Mr. Sipe acknowledge by making the
6 argument, that for me to stand up here and say that your
7 construction of the contract the way they propose to do
8 it is ludicrous, you know, he responds by saying, we
9 never took weeks or months. I mean, at the time we
10 entered into this contract, it was taking about 4 days to
11 cycle. And the question is, should it have taken 4 or 14
12 or 40 or 400. And they would say, well, we never took
13 400, we never even took 40. But the question is, is the
14 amount they took, was it reasonable under the terms of
15 this contract. And the Thompson case, on the application
16 of whereas clauses, Thompson doesn't deal with a
17 situation that we have here, which is where you have
18 whereas, an operative clause, both of which are clear and
19 both of which are consistent. Clear in the sense that
20 here they're talking about the desire for maximum
21 utilization of equipment and efficiency, and that
22 amplifies the obligation of the parties with respect to
23 provision of rail cars on behalf of Western and the
24 provision of track, crews, locomotives, on behalf of the
25 railroads. Thank you.

1 THE COURT: Anything else in regards to this issue?
2 If not, counsel, what the court intends to do is take a
3 brief recess, and I would tell you, hopefully no longer
4 than ten to fifteen minutes. Be recessed until that
5 time. Thank you.

6 (Court took a recess. Proceedings continued
7 as follows:)

8 THE COURT: I guess to start with, I would just say
9 that some people believe that time is a relative concept,
10 and my timing with you was that I was gonna be out for
11 about fifteen minutes. As counsel knows, it was longer
12 than fifteen minutes. And I apologize for the delay
13 while you were awaiting this court's ruling. Part of
14 that is part of the reason why you're here this morning
15 and now this afternoon, which is that the court was
16 familiar with your arguments that you set out in your
17 pleadings as it relates to the issues that I've taken up,
18 but I don't know if counsel would agree with me or not,
19 but because of the complexity of the issues that were
20 raised and regarding your-- your arguments in support of
21 the positions you were taking, the court wanted to be
22 clear in regards to your arguments as well as the
23 authorities that you were relying on. So, that's why the
24 court requested that you come here this morning. Along
25 the same lines, this issue that the court's taken up at

1 this time, which has to do with the motion for summary
2 judgment, and specifically the arguments regarding the
3 construction of specific contract terms, I wanted to take
4 time to go over your arguments that you made this
5 morning, in light of what's all ready been plead, and to
6 carefully review them one last time before I made my
7 ruling, just to make sure, again, that I was clear in
8 regards to what you were actually arguing, as well as to
9 review the law, and also specifically, in this issue, the
10 specific contract provisions that you were relying on.
11 So, it took me a little bit longer than I thought.
12 Again, I apologize for that delay, but the whole purpose
13 of that was to try to ascertain, again, the accuracy of
14 your arguments as well as the authorities you were
15 relying on. At this time, I am going to make some
16 rulings in regards to defendant's motion for summary
17 judgment dismissing all counts in plaintiff's first
18 amended complaint. And, I would set out for the record,
19 that the court has reviewed the contract provisions set
20 out by the parties in their arguments, and considered
21 their assertions that these terms are unambiguous.
22 Accordingly, the court rules as follows on the disputed
23 contract terms. Those were the ones that the court set
24 out for you to argue. Specifically, number one, and
25 there's an argument, and defendants were asking the court

NANCY MORONEY WISS, CSR, RMR

1 to find as a matter of law that no cycle time or other
2 timeliness standard was contemplated in the contract.
3 The court finds the parties did not intend to include,
4 and in fact, did not include in the contract a specific
5 cycle time provision dictating a specific time standard
6 that governs the parties' obligations under the contract.
7 However, after reviewing the contract as a whole, as it
8 must, the court finds that the parties did contemplate a
9 reasonable timeliness standard which would govern their
10 contractual obligations. Whereas here, a timeliness
11 standard has not been specified in a contract, a
12 reasonable time for performance must be construed by the
13 trier of fact. That's from a case of Rymph, spelled
14 R-Y-M-P-H versus Derby Oil Company at 211 Kansas 414.
15 Defense also asks court to find as a matter of law that
16 the contract does not require the defendants to transport
17 all of plaintiff's coal requirements to JEC. Regards to
18 that issue, the court finds the parties did not
19 contemplate that the defendants would transport all of
20 plaintiff's coal requirements to JEC. Instead, the clear
21 provisions of the contract require that defendants,
22 quote, shall transport all coal loaded in rail cars and
23 tendered by shipper at origins, end quote, and that's
24 from Article 3 A. Further, the court finds the parties
25 contemplated an annual minimum volume, rather than

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1 contemplating that all of plaintiff's requirements would
2 be shipped, by noting in Article 5 A 1, that, quote,
3 during each calendar year of the agreement, the railroads
4 shall transport the greater of 6 million tons or 100
5 percent of all tons of coal shipped from origins for
6 delivery to JEC, end quote. Defendants also ask the
7 court to find that the contract does not limit the number
8 of trains or rail cars that plaintiff may need to supply.
9 Court finds the parties did not intend that the number of
10 trains or rail cars that plaintiff may need to supply
11 would be limited. The contract, instead, contemplates a
12 minimum number of rail cars that plaintiff must provide.
13 The contract further contemplates that additional rail
14 cars may need to be provided by plaintiff. However, the
15 court finds there is no limit on the number of rail cars
16 to be supplied by plaintiff in the contract. Included in
17 defendant's motion for summary judgment were issues
18 involving restitution. Given the court's ruling today,
19 the court finds that those remaining issues and arguments
20 as they were directed towards plaintiff's claim for
21 restitution, slash, termination, slash, rescission are
22 moot. Defendants in their motion for summary judgment
23 also argue and contend that they should be granted
24 judgment on a breach of obligation of good faith claim,
25 because Kansas law does not provide a separate cause of

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1 action based on the duty of good faith and fair dealing
2 in performance of a contract. Defendants appear to argue
3 that where plaintiff's breach of contract claim fails,
4 plaintiff's implied covenant claim based on this same
5 contract must also fail. As indicated previously, the
6 court has denied defendants' motion seeking judgment as a
7 matter of law on plaintiff's breach of contract claim.
8 Accordingly, as defendants' arguments are co-dependent,
9 the court similarly denies defendants' motion seeking
10 summary judgment on plaintiff's implied covenant claim.
11 Under Kansas law, a duty of good faith and fair dealing
12 is implied in every contract, except employment at will
13 contracts. That's from Daniels versus Army National Bank
14 at 249 Kansas 654. The implied covenant is declarative
15 in nature. It, quote, does not create or supply new
16 contract terms, but grows out of existing ones, end
17 quote. That's from Pizza Management Incorporated versus
18 Pizza Hut at 737 Fed. Supp. 1154. Because the duty is
19 implied in a contract, quote, conduct of the party from
20 that duty is a breach of a contractual obligation, end
21 quote. That's from Bonanza Incorporated versus McLean at
22 242 Kansas 209. Accordingly, a breach of duty of good
23 faith and fair dealing is considered a breach of
24 contract. Again, that's from Pizza Management
25 Incorporated, 737 Fed. Supp. at 1167. Here, plaintiffs

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1 assert a claim of breach of duty of good faith and fair
2 dealing. Under Kansas law, this claim is more properly
3 characterized as a breach of contract claim based upon
4 alleged breach of contract term allegedly established by
5 the implied covenant. Although plaintiff has
6 characterized its implied covenant claim as a breach of
7 the duty of good faith, the court construes that claim as
8 a claim for breach of contract. Count two, plaintiff
9 alleges defendants' breached the duty of good faith and
10 fair dealing by engaging in behavior that constitutes a
11 breach of the contract at issue. Although the implied
12 covenant may not be used to create, quote, essential
13 terms of the contract on which minds of the parties have
14 not met, end quote, the courts will impose such implied
15 duty where the good faith performance of an obligation or
16 a duty is required in order to effect the reasonable
17 expectations of the parties. That's from a case of
18 Flight Concepts at 38 Fed. 3rd 1157. Defendants' motion
19 is granted in part and denied in part, as stated on the
20 record. Specifically, defendants' motion is granted to
21 the extent it asks the court to find as a matter of law
22 that the contract at issue is fully integrated.
23 Defendants' motion is granted to the extent it asks the
24 court to find that no independent obligation is created
25 by the fourth whereas clause at issue. And regarding the

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1 contract construction issues, number one, defendants'
2 motion is denied to the extent it asks the court to find
3 as a matter of law that no timeliness standard or cycle
4 time standard is contemplated in the contract. Number
5 two, defendants' motion is granted to the extent it asks
6 the court to find as a matter of law that the contract
7 does not require defendants to transport all of
8 plaintiff's coal requirements to JEC. Number three,
9 defendants' motion is granted to the extent it asks the
10 court to find as a matter of law that the contract does
11 not limit the number of trains or rail cars that
12 plaintiff may need to supply. Defendants' motion is
13 considered moot as to all remaining issues, ie, the
14 arguments directed towards termination, rescission,
15 restitution claims. The court made its ruling in regards
16 to the breach of good faith obligation, and that finally,
17 the defendants' motion is denied, as the court finds that
18 genuine issues of material fact exist that preclude
19 summary judgment on plaintiff's remaining breach of
20 contract claim. Last motion is plaintiff Western
21 Resources' motion for partial summary judgment, which is
22 document 344. Plaintiff is asking the court to find the
23 contracts between the parties are valid and enforceable
24 requirements contracts within the meaning of Kansas law.
25 Such declaration will, plaintiff contends, define the

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1 parties' obligations. Specifically, plaintiffs contend
2 that where the contracts at issue are declared
3 requirement contracts, the parties are required to act in
4 accordance with standards of quote, good faith, end
5 quote, and reasonableness, end quote, in administering,
6 interpreting, and enforcing the contracts. Plaintiff
7 contends that the requirements contracts impose an
8 obligation upon plaintiff to buy all the transportation
9 of coal it required to fuel its JEC plant from
10 defendants, and impose an obligation upon defendants to
11 stand ready and able to provide all those transportation
12 needs. Again, I'm familiar with the arguments in the
13 pleadings. The court does have some questions in regards
14 to this argument, or this issue. Specifically, from the
15 plaintiffs, and defendants, what do the parties believe
16 the effect of declaring the contracts at issue are
17 requirements contracts will be, if they differ from what
18 the court's all ready set out? And number two, what
19 additional obligations imposed upon the parties under
20 this label of requirements contract are-- that are not
21 present under general contract law principles? And
22 again, I guess, the court wants clarification in regards
23 to what is-- what legal effect does this label have over
24 and above general contract law principles? It appears to
25 the court that the parties are not disagreeing that a

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1 contract was entered into. It's more, the disagreement
2 has to do with its terms. Is it still Mr. Bodamer in
3 regards to that?

4 MR. BODAMER: Yes. Yes, sir. I think the-- trying
5 to-- in line of what you've been talking about and
6 ruling, I'm trying to think how best to structure this,
7 but in the absence-- let's put it this way, if this court
8 determines that there is no obligation to deliver
9 Western's requirements for Jeffrey Energy Center, then
10 what are the railroads' transportation obligations?
11 Because, as we talked about earlier, it is a contract for
12 the transportation of coal with no specified amount of
13 coal set forth in the contract. And in the KPL versus BN
14 case, the 10th Circuit decided in 1985, '84, '85, the
15 railroads' challenged-- at that time to that particular
16 contract, which was very similar to this one in that
17 respect-- that there was no specified amount of coal to
18 be delivered at any given time; it was undefined,
19 unlimited, and the railroads' challenged that agreement,
20 because it was in their mind illusory, that there was no
21 obligation by either party really to perform, and the
22 court said no, there an obligation, because it was clear
23 from the agreement and the circumstances that Western
24 desi-- or that the KPL desired and needed all of its coal
25 from the Powder River Basin for use at JEC transported by

1 the BN, in that Western had an obligation-- or excuse
2 me-- KPL, our predecessor, had an obligation to exercise
3 good faith in determining what its needs were, and then
4 likewise, the railroads had an obligation, then, to
5 deliver those requirements as specified, in good faith,
6 and so, the requirements aspect of it, because we weren't
7 taking the specified amount, but we were basically taking
8 all output, they would transport all coal. Then the
9 court said the contract's not illusory. It's not missing
10 a key term, and that it is enforceable. And whereas the
11 BN was trying to avoid the contract at that time, because
12 they wanted to get a higher price to a different tariff.
13 Court said, no, BN, you're bound-- you are bound to
14 deliver the requirements, and Western, you're bound to
15 transport your requirements via the BN. The same issue
16 came up a few years later, 1995, I think, and we cited
17 this in our papers as well, in the district court of
18 Shawnee County case, except the roles were reversed. It
19 actually involved a different Western plant. It involved
20 the Lawrence and Tecumseh plant, also referred to as
21 LEC-TEC (sp.), and at that time KPL, or Western actually,
22 was taking the position that they did not have to
23 transport all their requirements, the Lawrence and
24 Tecumseh, via the railroads, and the railroads said, oh,
25 yes, you do, because it's clear in that contract, as it

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1 is in this one, by the way, that there was an obligation
2 to transport 100 percent or all-- actually they used all,
3 we use 100 percent of all, of the requirements. And so,
4 once again, that's two courts have looked at contracts in
5 the same context involving similar moves, one identical
6 move, the other a similar move, and said, these contracts
7 are enforceable as requirements contracts. Now, what
8 impact does it have on our case? Well, I suppose in
9 light of the court's ruling, there's still an issue to be
10 tried to the jury as to whether the railroads timely
11 transported our coal, and whether they timely returned
12 the empties. And maybe ultimately it makes no
13 difference, but the way we have always viewed the case,
14 and as set forth in our pretrial order, and I think in
15 our complaints and amended complaints, we were committed
16 to the railroads to transport all of our coal needs that
17 we need to operate Jeffrey Energy Center everyday to
18 supply our 6 hundred thousand, Western's 6 hundred
19 thousand customers, that we were obligated to transport
20 all that coal via these railroads, and then likewise, the
21 railroads were obligated to provide, again, necessary
22 equipment and facilities in order to transport that coal.
23 And we also have taken the position that although the
24 annual declarations as to what our coal needs,
25 anticipated coal needs would be, we're non-binding in the

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1 sense they could vary and could be changed, as they were
2 from time to time, that the amount of coal we needed is
3 best evidenced by the amount of coal we declared we would
4 need by month for the coming year. And so, our-- our
5 theory of-- of the way we were-- or intend to prove our
6 damages is to show that it's our position that our needs
7 are evidenced by our declarations, and that there's no
8 dispute in this case, but that the railroads in '97 and
9 98, and again in 2001, failed to transport all the coal
10 we needed to run Jeffrey Energy Center; in other words,
11 all of our requirements. Now, that's-- I mean, that's
12 the essence of the case. Umm, now, they didn't do it,
13 and the reason we only moved for partial summary judgment
14 as opposed to, you know, summary judgment, saying, well,
15 clearly there's a breach here, because there is this
16 issue as to the timeliness that they needed to cycle
17 those trains, and there is the issue as to the
18 sufficiency of the cars that we're required to provide,
19 and that it's for ultimately the jury to decide whether
20 the parties complied with the specific terms of this
21 agreement, whether they did so in good faith, whether
22 they did exercise fair dealing, in terms of the way they
23 construed and-- and operated under this particular
24 agreement, and that the requirements aspect of it,
25 though, was ultimately the determinative of whether they

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1 had met their obligation, and if so, what were our
2 damages, our compensatory damages, for their failure to
3 do so? Also, with respect to the restitution claim,
4 which-- and I want to ask for clarification for that-- on
5 that in a minute, but if it also provided a basis there,
6 because, you know, they've told you, I think, today, and
7 it's clearly in the papers, you know, that they
8 transported 91 or 92 percent, you know, during this
9 questionable period, and 98 percent over a long period of
10 time, but it's clear that what Western needed was a-- you
11 know-- regular, consistent, and reliable supply of coal,
12 and that it did little good to receive coal tomorrow that
13 we needed to burn today in order to keep these lights and
14 these air conditioners running. And so, the requirements
15 aspects, again, based on our nominations, would provide a
16 basis for whether-- not only for whether there was a
17 breach, but whether that breach was substantial, and
18 again, it's our position that-- that it would be. I
19 think-- have I answered your-- I believe that's all I
20 have-- I think I've answered your question.

21 THE COURT: Thank you. Mr. Sipe.

22 MR. SIPE: Your Honor, might I ask you to restate
23 the first of the two questions, just so I'm sure that I
24 have it straight?

25 THE COURT: In regards to the partial summary

1 judgment motion, the court is asking that, what do the
2 parties believe the effect of declaring the contracts at
3 issue are requirements contracts will be, the legal
4 effect of that, and what additional obligation imposed
5 upon the parties under this label are not present under
6 general contract law principles?

7 MR. SIPE: I'm going to answer these questions,
8 Your Honor, in light of your prior rulings on the
9 railroads' motion, as I understand those rulings. And
10 the answer to the first question is that the-- the legal
11 effect of declaring this contract a requirements
12 contract, in light of your prior ruling, would be, I
13 think it would be, first of all, meaningless, because to
14 say it's a requirements contract really doesn't say
15 anything about the specific obligations under the
16 contract. But it also, I think, would be inconsistent
17 with the prior ruling, which, if I understand it
18 correctly, held that the railroads do not have an
19 obligation to transport Western's requirements to the
20 Jeffrey Energy Center; that they have an obligation only
21 to transport a minimum of 6 million tons a year, and that
22 their actual transportation obligation is spelled out in
23 Article 3 A, which is to transport all the coal loaded
24 and tendered at the mines. Therefore, in response to the
25 first question, I think the-- not only would there be no

1 point in granting the motion and declaring this a
2 requirements contract, but it would result in an
3 inconsistency with the prior ruling. As to the second
4 question, what additional legal effect or con-- or
5 contract obligations might be imposed beyond those
6 expressed either in this agreement or in contract law if
7 the label were adopted? I think the answer, again, is
8 none, and it would be counter-productive to impose the
9 label. The court has all ready ruled that this is a
10 fully integrated contract, and is to be interpreted in
11 accordance with the literal language of the operative
12 provisions. And adding the requirements label on top of
13 that would do nothing. Mr. Bodamer's reference to prior
14 cases involving contract law, requirements contracts, is
15 clearly in opposite, given the ruling that this is a
16 fully integrated contract. I believe I've been
17 responsive, Your Honor, to your questions, but if you
18 have further ones, I'd be happy to try to answer them.

19 THE COURT: Thank you. Anything else, Mr. Bodamer?

20 MR. BODAMER: Just one brief point, Judge. Mr.
21 Sipe again said that the obligation is to ship 6 million
22 tons, but it's not. The obligation is to ship the
23 greater of 6 million tons or 100 percent of all coal
24 shipped from the Powder River Basin to Jeffrey Energy
25 Center. And under the theory that you just heard, we

1 have-- and based on the court's findings earlier today,
2 this would result in Western being obligated to ship all
3 of its coal needs via these railroads, but the railroads
4 are only obligated to ship 6 million tons. I mean,
5 that's no way to run a railroad. And to say that, I
6 mean, then again, it leaves it totally within the
7 railroads' determination as to how much they'll ship,
8 because even with a finding that there's an unlimited
9 amount of rail cars or train sets we're obligated to put
10 in service, the more we put in, the more they
11 theoretically would be able to park, and so, we never
12 get-- I mean, it's just-- it would be an endless
13 situation, and therefore, I think an illusory contract.
14 Maybe there's no contract at all under the theory that
15 the railroads deposited here. Thank you.

16 THE COURT: If there's nothing else, give me a
17 minute here. Court's ready to rule in regards to this
18 motion. Court would set out what it believes to be the
19 relevant law that relates to this issue. Requirements
20 contracts have long been held valid and enforceable in
21 Kansas. In reference to this case, Kansas Power and
22 Light Company versus Burlington Northern Railway Company
23 at 740 Fed. 2nd, 780, that's a 10th Circuit case from
24 1984, also Miller versus Sirloin Stockade, 224 Kansas 32,
25 1978 case. In a typical requirements contract, a buyer

1 agrees to buy all of the items it requires, in good faith
2 from the seller. A requirements contract, also referred
3 to as an exclusive dealing contract, obligates both
4 parties-- I'll highlight this for you counsel-- to use
5 best efforts in their performance of the contract. That
6 is, they must operate in good faith and be reasonably
7 diligent in performing under the contract. That's from
8 Kansas Statute Annotated, section 84-2-306, comment
9 number three. And generally for requirements contracts
10 to be valid, case law requires that the buyer promise to
11 buy the goods at issue, exclusively from the seller. If
12 such exclusivity is absent, generally the contract lacks
13 mutuality, since the buyer might order all its
14 requirements from other suppliers. That's from Kansas
15 Statute Annotated 84-2-306, comment two. And also,
16 Propane Industries Incorporated versus General Motors
17 Corporation, at 429, Fed. Supp., at 214, it's a Western
18 district of Missouri case where they applied Kansas law,
19 based on the facts in their case. However, the
20 agreement, or quote, the agreement need not specifically
21 require the buyer to forego other supply sources if the
22 practical effect is the same, end quote. And that's from
23 Perington Wholesale Incorporated versus Burger King
24 Corporation, at 631 Fed. 2nd 1369, 10th Circuit case,
25 1979. The court's understanding of what the relevant law

NANCY MORONEY WISS, CSR, RMR

1 is as I've set it out, the court is gonna make a ruling
2 that it believes is not inconsistent with the previous
3 ruling that defendants pointed out in their arguments.
4 Specifically, defendants state that previously regarding
5 the contract construction issue, the court had ruled that
6 defendants' motion was granted to the extent it asks the
7 court to find as a matter of law that the contract does
8 not require defendants to transport all of plaintiff's
9 coal requirements to JEC. The court does not find that
10 inconsistent with the fact that here, the court finds the
11 parties have entered into a requirements contract,
12 thereby obligating the parties to act in good faith and
13 in a reasonably diligent manner when performing the terms
14 of the contract. Specifically, the requirements
15 contracts obligated the plaintiff to purchase its
16 transportation requirements for JEC from defendants, and
17 obligated defendants to be reasonably diligent and to use
18 their best efforts to provide those transportation needs.
19 I believe those were all the motions the court identified
20 at the beginning of our hearing as to what I was gonna
21 rule on. In light of the court's rulings today, the
22 court would ask counsel that you review the motions
23 and/or issues that remain outstanding, and consider
24 whether any of those motions are rendered moot or no
25 longer at issue. And I'm gonna ask that you inform the

NANCY MORONEY WISS, CSR, RMR

1 court about any changes, if there are any, by this
2 Friday, July 26th. One last matter the court has,
3 counsel. I reviewed the papers that have been submitted
4 in regards to our Daubert issues. I am requesting
5 counsel's cooperation and their assistance in regards to
6 those Daubert matters. The court is requesting that the
7 parties prepare a one to two page summary on each of
8 their proposed experts, including the very specific
9 areas. Number one, what specific testimony is the expert
10 tendered to give? Number two, what specific issue is the
11 proposed testimony relevant to? Is it in regards to the
12 claims, is it in regards to specific contract provisions,
13 is it in regards to damage-- the damages? Number three,
14 why is the expert qualified to give the specific
15 testimony? And number four, why is the expert's proposed
16 testimony reliable? Likewise, for each pending motion in
17 limine, the court is asking the moving party to prepare,
18 again, a summary of why the expert is not qualified to
19 testify as proposed, and number two, why is the expert's
20 proposed testimony not reliable? As it relates to this
21 Daubert matter as well as this motion in limine, the
22 court is asking that that be submitted to the court by
23 this Friday, July 26th. Part of that, counsel, is that
24 we're on a very short time-frame here. As you know,
25 based on what I said at the very, very beginning, we have

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1 Daubert hearings scheduled for August 7th, 8th, and 9th,
2 and we have our motions in limine the following week, and
3 then we have our trial scheduled for August 19th. My
4 hope, counsel, with all of this, calling you in today and
5 also getting these other additional matters addressed, is
6 to allow you to adequately prepare your case for trial,
7 and as a result, also allow the court to be prepared to
8 address any issues that come up, or give you, hopefully,
9 some direction in regards to the presentation of your
10 evidence, if and when we start our trial. So, I would
11 ask for your cooperation. I will let you know that-- I
12 usually save this for day of trial, but assisting me with
13 this case is my law clerk Jennifer Lepentis, and if there
14 are questions that come up, she is the person to speak
15 to. One of the things I do with every case is inform
16 counsel at the beginning of our trial, is that whenever
17 my clerks speak to you, in this case Miss Lepentis, you
18 can take that as the court speaking to you. So, whatever
19 questions she has of you, I would appreciate your
20 cooperation, and any courtesies you may give me, transfer
21 to my staff. Along with her today, we had Jennifer
22 Newman assisting us, intern with the clerk's office. My
23 courtroom deputy, my administrative assistant, is Jane
24 Casady right in front of me, and she is the person that
25 maybe you all ready have had contact/communication with.

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1 Again, I'd ask that you cooperate with her as much as
2 you're able to. Our court reporter, you probably all
3 ready met, is Nancy Wiss. Counsel, there's a lot that I
4 covered. Again, I'm finished with what I was intending
5 to do this afternoon. Unless there's anything else,
6 we'll be recessed at this time. I'll wait to hear from
7 you in the future. Thank you.

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1 C E R T I F I C A T E

2

3 I, Nancy Moroney Wiss, a Certified Shorthand
4 Reporter and the regularly appointed, qualified and
5 acting official reporter of the United States District
6 Court for the District of Kansas, do hereby certify that
7 as such official reporter, I was present at and reported
8 in machine shorthand the above and foregoing proceedings.

9 I further certify that the foregoing transcript,
10 consisting of 65 typewritten pages, is a full, true, and
11 correct reproduction of my shorthand notes as reflected
12 by this transcript.

13 SIGNED this 23rd day of July, 2002.

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16 _____
Nancy Moroney Wiss, CSR, CM

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